Supreme Court, U.S.
FILED
OCT 6 1997
CLERK

No. 97-216

In The

Supreme Court of the United States

October Term, 1997

THE KIOWA TRIBE OF OKLAHOMA
a federally recognized Indian Tribe,

Petitioner,

vs.

AIRCRAFT EQUIPMENT COMPANY
an Oklahoma Partnership, et al.,

Respondents.

On Petition For Writ Of Certiorari To The Oklahoma Supreme Court

BRIEF IN OPPOSITION TO PETITION FOR WRIT OF CERTIORARI

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October 6, 1997

COCKLE LAW BRIEF PRINTING CO., (800) 225-6964
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59 pp

QUESTION PRESENTED

Whether an injunction in support of interpleader, entered in an action to enforce against an Indian tribe a judgment valid on its face, which was rendered on a transaction arising outside of Indian Country, interferes with the tribe's right to make its own rules and be governed by them.

PARENTS/SUBSIDIARIES OF CORPORATE RESPONDENTS

The parent and/or subsidiaries of each of these Respondents are:

Respondent, Aquila Energy Corporation:

UtiliCorp. United, Inc.
Aquila Gas Pipeline Corporation

Respondent, The Home-Stake Royalty Corporation:

The Home-Stake Royalties, Ltd.
The Home-Stake Gas Corporation

Respondent, Sun Company, Inc. (R&M):

Sun Company, Inc.

Respondent, Associated Natural Gas, Inc. (now Duke Energy Field Services, Inc., formerly PanEnergy Field Services, Inc.):

Duke Energy Natural Gas Corporation
(formerly PanEnergy Natural
Gas Corporation)
AIM Pipeline Company
ANGI Gas Services Company
Associated Louisiana Intrastate
Pipeline Company
Associated Storage Corporation
Centana Gathering Company
Centana Oil Gathering Company
Centana Intrastate Pipeline Company
PanEnergy Comite Company
Grand Valley Gas Canada, Ltd.
GV Power Corporation II
National Helium Corporation

PARENTS/SUBSIDIARIES OF CORPORATE RESPONDENTS – Continued

PanEnergy Dauphin Island Company
PanEnergy Financial Services, Inc.
PanEnergy Intrastate Pipeline Company
PanEnergy Louisiana Corporation
PanEnergy Louisiana Intrastate Company
PanEnergy Marketing Company
PanEnergy Mobile Bay Processing Company
PanEnergy NGL Services, Inc.
PanEnergy Texas Gathering Company
PanEnergy Texas Intrastate Pipeline Company

Respondent, Associated Transport and Trading Company (now Duke Energy Transport and Trading Company, formerly PanEnergy Transport and Trading Company):

Duke Energy Natural Gas Corporation (formerly PanEnergy Natural Gas Corporation)
Lubrication Services, Inc.
Duke Energy Pipe Line Company

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RESPONDENTS' BRIEF IN OPPOSITION TO PETITION FOR WRIT OF CERTIORARI

Respondents, Aquila Energy Corporation, The Home-Stake Royalty Corporation, Sun Company, Inc. (R&M), Associated Natural Gas, Inc., Associated Transport and Trading Company and Kerr-McGee Refining Corporation (referred to herein collectively as "the Purchasers"), respectfully request that this Court deny the petition for writ of certiorari, seeking review of the Oklahoma Supreme Court's opinion in this case.

STATUTORY PROVISIONS INVOLVED

Okla. Stat. tit. 12, § 2022 (1991), is the Oklahoma statute upon which the Purchasers, as disinterested stakeholders, were permitted to deliver the funds in question to the court by way of interpleader. That statute provides in pertinent part:

> A. Persons having claims against the plaintiff may be joined as defendants and required to interplead when their claims are such that the plaintiff is or may be exposed to double or multiple liability. . . . A defendant exposed to similar liability may obtain such interpleader by way of cross-claim or counterclaim. . . .
>
> * * *
>
> C. The court may make an order for the safekeeping of the subject of the action or for its payment or delivery into the court. . . . Where the party seeking relief by way of interpleader claims no interest in the subject of the action and the subject of the action has been deposited

> with the court . . . , the court should discharge him from the action and from liability as to the claims of the other parties to the action with costs and, in the discretion of the court, a reasonable attorney fee.

STATEMENT OF THE CASE

Introduction. Petitioner, Kiowa Tribe of Oklahoma (the "Tribe"), makes several statements in its Petition for Writ of Certiorari that are not supported by the record in this case. The Tribe asserts these facts to support its claim that the collection remedies provided to Respondent Aircraft Equipment Company ("Aircraft"), and the interpleader remedy provided to the Purchasers in this case interfere with the Tribe's right to self government and self-determination.

However, these facts were neither presented to nor considered by the Oklahoma Supreme Court in reaching its decision in this case. The record in this case is limited and very few facts were presented to the Oklahoma Supreme Court. *See* Kiowa's Brief in Chief, Appendix 5-8.[1] The focus of the Tribe's briefs before the Oklahoma Supreme Court was its argument that Aircraft's action to enforce the prior judgment violated the Tribe's sovereign

[1] In accordance with its normal practice, the Oklahoma Supreme Court decided the appeal based on the briefs submitted by the parties. Any issues not addressed in an appellant's brief are deemed waived. *Hadnot v. Shaw*, 826 P.2d 978, 981 (Okla. 1992).

immunity for the same reason that the entry of the underlying judgment in the prior lawsuit violated the Tribe's right to sovereign immunity. The Tribe did not assert any additional authorities to support its argument that the enforcement remedies interfered with its right of taxation or self-government, as pointed out by the Oklahoma Supreme Court in its opinion. (Opinion, ¶¶ 9, 10, Petitioner's Appendix 10-11).

Trial court proceedings. Aircraft filed this case seeking equitable relief in the nature of a creditor's bill to satisfy a money judgment against the Tribe that was entered in a prior lawsuit. The underlying money judgment was a result of a breach of a contract between the Tribe and a non-Indian, executed outside of Indian Country. That contract was not attached to any pleading, nor was it introduced into evidence or otherwise made a part of the record in this case.

The judgment in the prior lawsuit was affirmed while the appeal in this case was pending before the Oklahoma Supreme Court. *Aircraft Equipment Company v. Kiowa Tribe of Oklahoma*, 921 P.2d 359 (Okla. 1996) ("*Aircraft I*"). The Tribe did not challenge the Oklahoma Supreme Court's opinion in *Aircraft I* by way of *certiorari*, and the underlying money judgment is now a final judgment.

Aircraft brought this lawsuit against the Tribe, Watson Management Group, Inc. ("Watson"), and certain oil and gas entities that purchased oil and gas produced from Kiowa lands and remitted severance taxes on such production to the Tribe, including the Purchasers. (Petition and Amended Petition, R. 1, 21). Watson collected severance taxes under a contract with the Tribe, under

which Watson was paid 50% of the amount of the taxes collected. (Petition, ¶4, R. 1; Answer ¶4, R. 125). Aircraft alleged that it was entitled to enforce its judgment by collecting severance taxes directly from the Purchasers, in priority over the claim of either Watson or the Tribe.

The Tribe asserted sovereign immunity and challenged the trial court's power to entertain Aircraft's suit. Because of the conflicting claims, the Purchasers, as disinterested stakeholders, sought to interplead the disputed severance taxes into court on a continuing monthly basis until final resolution of the dispute between Aircraft and the Tribe, pursuant to Okla. Stat. tit. 12, § 2022. (R. 158-163, 164-167, 177-179, 210-215, 216-219, 281-285, 286-288, 355-359, 360-364).

There is no support in the record for the Tribe's statement that this action involves "all of the oil and gas severance taxes imposed by Kiowa upon those who produce oil and gas from Kiowa Indian Country." (Petition for a Writ of Certiorari at 4). In Aircraft's Petition, cited by the Tribe, and in its Amended Petition, Aircraft sought relief only with respect to the severance taxes remitted by the named oil and gas entities. (R. 1, 21). Nor is there any support in the record for the Tribe's statement that its tribal functions were "reduced or eliminated." (Petition for a Writ of Certiorari at 12). With respect to the Tribe's statement that its severance taxes comprise about one-third of the Tribe's *tax* revenues, there is no evidence in this case of how much of that one-third is comprised of the severance taxes remitted by the oil and gas entities named in this case. Moreover, there is no evidence showing how much of the Tribe's *total* revenues are comprised of the Tribe's *tax* revenues.

Contrary to the Tribe's statement at page 5 of its Petition, the oil and gas entities that were sued are not production companies who owed the severance taxes.[2] Nor did the Tribe assert that payment of the severance taxes to the court or Aircraft constituted a failure to pay the tax or seek foreclosure of a resulting tax lien.[3]

By order filed July 5, 1995, the trial court granted the Purchasers' request to interplead the severance taxes into court, restrained the Tribe and Aircraft from taking any action against the Purchasers relating to the severance taxes paid into court, and dismissed the Purchasers from the action. (Order, R. 409-421.) On October 13, 1995, the court entered judgment finding that Aircraft was entitled

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[2] Under the Tribe's laws, producers of the oil and gas were liable for the severance taxes and the Tribe had the right to impose a tax lien upon the producers' oil and gas leasehold estate if the severance taxes were not paid. However, purchasers of the production were authorized to remit the taxes to the Tribe on behalf of the producers. (Tribe's Answer at 2, ¶ 2, R. 125).

[3] The Tribe alleged in its answer to the petition that the producers were necessary parties because their interests in the oil and gas leasehold estates were subject to a tax lien and foreclosure. *Id.* at 4, ¶ 5, R. 125. The Tribe did not pursue its claim that the producers should be joined. The Tribe's laws, however, provide that monetary and other penalties can be imposed upon purchasers for late payments of the severance tax, and provided a mechanism by which the Tribe could perfect a lien against the producer's share of oil and gas produced and the proceeds thereof, including the production and proceeds in the hands of purchasers. (*See* Tribe's laws attached to Amended Answer, R. 188). The Tribe did not seek to perfect or foreclose any such lien in this case.

to recover the disputed severance taxes to satisfy Aircraft's judgment in *Aircraft I*. However, the court provided that the severance taxes due from the Purchasers should be paid into court, rather than to Aircraft, until further order of the court. The court further ordered that the Tribe should be restrained from enforcing any lien against the Purchasers with respect to the severance taxes which were paid into court. (Journal Entry of Judgment, R. III-129-III 152).

The appeals from the judgment and order. Aircraft filed an appeal, challenging the portion of the judgment granting interpleader.[4] The Tribe also filed an appeal from the judgment, asserting that the trial court did not have the authority to enforce the underlying judgment for the same reasons that it did not have the authority to enter the underlying judgment. The Tribe did not challenge the Purchasers' right to file an interpleader action or the court's jurisdiction to preside over such interpleader action. A review of the Tribe's Brief in Chief reveals that the only challenge to the court's jurisdiction was the court's "power over damage suits or a suit to enforce damage judgments." (Appendix 8). In fact, in responding to Aircraft's brief, challenging the interpleader, the Tribe stated:

> The oil company defendants found themselves, on the one hand, subject to a possible court

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[4] Aircraft's appeal was docketed in Case No. 85,975, and characterized by the Oklahoma Supreme Court as a cross-appeal. (Opinion, ¶ 12, Petitioner's Appendix 12). The issue was resolved on appeal in favor of the Purchasers. *Id.*

> order directing them to pay Kiowa's tax revenues to Aircraft, and, on the other hand, facing Kiowa's assertion that such an order was jurisdictionally void, and Kiowa would foreclose its tax liens upon the oil companies' oil and gas leases. *Understandably, the oil companies interplead the tax revenues and asked to be relieved from further proceedings.*

(Appendix 29, emphasis added).

The Oklahoma Supreme Court affirmed the order granting interpleader and the judgment.

REASONS FOR DENYING CERTIORARI

I. THE DISTRICT COURT HAS THE POWER TO ENFORCE ITS JUDGMENT AGAINST THE TRIBE.

It has long been held that a court's power to render a judgment includes the power to enforce its judgment. *U.S. ex rel Riggs v. Board of Supervisors of Johnson County, Iowa*, 73 U.S. 166, 6 Wall. 166, 18 L. Ed. 768 (1867); *Little Horn State Bank v. Stops*, 170 Mont. 510, 555 P.2d 211 (1976), *cert. denied*, 431 U.S. 924, 97 S. Ct. 2198, 53 L. Ed. 2d 238 (1977). The case of *Little Horn State Bank* involved facts similar to the instant case. In that case, a bank obtained a judgment against the Indian defendants. The state district court found that the plaintiff bank could not execute on the Indian defendants' property, located on the reservation, in order to satisfy its judgment. The bank appealed. On appeal, the Montana Supreme Court framed the issue based on this Court's pronouncement in

Williams v. Lee, 358 U.S. 217, 220, 79 S. Ct. 269, 271, 3 L. Ed. 2d 251, 254 (1959), wherein the Court stated:

> Essentially, absent governing acts of Congress, the question has always been whether the state action infringed on the right of reservation Indians to make their own laws and be ruled by them.

The question presented in *Little Horn State Bank* was virtually identical to that presented in this case:

> [W]hether state action, in the form of a writ of execution to enforce a judgment rendered on a transaction arising outside the reservation, interferes with the tribe's right to make its own rules and be governed by them.

Little Horn State Bank, 555 P.2d at 213. The court held the enforcement of the bank's judgment did not interfere with the tribe's right of self-government.

The court said that the tribe provided no means of enforcing the state court judgment and was not subject to the full faith and credit clause, as are sister states. Consequently:

> Until the Crow Tribe has provided a means of such enforcement or acted in some manner within this area, we fail to see how tribal self-government is interfered with by assuming that reservation Indians pay for their debts incurred off the reservation.

Little Horn State Bank, 555 P.2d at 214. The court pointed out that the defendant tribal members elected to leave the reservation and conduct their affairs within the jurisdiction of the state courts. By doing so, they submitted themselves to the laws of the state. They could not violate

those laws and then retreat to the sanctuary of the reservation for protection. The court rejected the authorities cited by the Indian defendants because this was not a case of a non-member choosing to transact his business within the boundaries of the Indian reservation, as in *Williams v. Lee, supra,* or *Kennerly v. District Court of Montana,* 400 U.S. 423, 91 S. Ct. 480, 27 L. Ed. 2d 507 (1971).[5]

The court relied on this Court's holding in *Mescalero Apache Tribe v. Jones,* 411 U.S. 145, 148, 93 S. Ct. 1267, 1270, 36 L. Ed. 2d 114, 119 (1973), wherein the Court said:

> Absent express federal law to the contrary, Indians going beyond reservation boundaries have generally been held subject to non-discriminatory state law otherwise applicable to all citizens of the state.

The court found the Indian defendants went beyond the boundaries of the Crow Indian Reservation and that the execution statutes were nondiscriminatory and otherwise applicable to all citizens of the state. The court said the appeal essentially boiled down to whether the jurisdiction granted in *Mescalero* is the same as that defined by the United States Supreme Court in *Riggs,* 73 U.S. at 166 and *Pam-To-Pee v. U.S.,* 187 U.S. 371, 23 S. Ct. 142, 47 L.

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[5] In its Petition, the Tribe has also erroneously relied upon cases *not* involving a tribal member's transaction of business outside of Indian country. *See, e.g., Washington v. Confederated Tribes of Colville Indian Reservation,* 447 U.S. 134, 100 S. Ct. 2069, 65 L. Ed. 2d 10 (1980); *Merrion v. Jicarilla Apache Tribe,* 455 U.S. 130, 102 S. Ct. 894, 71 L. Ed. 2d 21 (1982); *California v. Cabazon Band of Mission Indians,* 480 U.S. 202, 107 S. Ct. 1083, 94 L. Ed. 2d 244 (1987).

Ed. 221 (1902), or whether it was merely the opportunity to render a judgment incapable of enforcement. The court said the latter would be absurd and quoted from this Court's decision in *Pam-to-Pee*, wherein the Court stated:

> The award of execution is a part, and an essential part of every judgment passed on by a court exercising judicial power. It is no judgment, in the legal sense of the term, without it. Without such an award the judgment would be inoperative and nugatory, leaving the aggrieved party without a remedy. It would be merely an opinion, which would remain a dead letter, and without any operation upon the rights of the parties.

Pam-To-Pee, 187 U.S. at 383. To avoid such an illogical situation, the court held that a writ of execution from the state court was valid within the Indian reservation when such was a means of enforcing a valid judgment of that court. The court pointed out that individual rights, due process, impartial and effective maintenance of justice, and the public confidence in and respect for the courts is paramount in the resolution of these kinds of matters. The citizens of the state would be grossly deprived if, under the guise of individual due process, they not only had no speedy, adequate, remedy, but no remedy at all.

As stated by the Montana Supreme Court in *Little Horn State Bank*, its decision in that case is supported by the holdings of this Court. This Court has held that, absent express federal law to the contrary, Indians going beyond reservation boundaries are subject to non-discriminatory state law otherwise applicable to all citizens of the state. *Mescalero Apache Tribe v. Jones*, 411 U.S.

at 148-49, 36 L. Ed. 2d at 119; *Organized Village of Kake v. Egan*, 369 U.S. 60, 72, 82 S. Ct. 562, 7 L. Ed. 2d 573, 582 (1962). The Court has declared that state laws may be applied to Indians going beyond reservation boundaries, unless such application would interfere with the reservation's self-government or impair a right granted or reserved by federal law. *Organized Village of Kake*, 369 U.S. at 75.

II. AN INJUNCTION, RENDERED UNDER NON-DISCRIMINATORY STATE LAW, WHICH WILL REMAIN IN EFFECT ONLY UNTIL THE JURISDICTIONAL ISSUE RAISED BY THE TRIBE IS FINALLY DECIDED, IS PROPER.

The Tribe relied in this case on a stipulation entered into in a prior lawsuit by Aircraft that severance taxes collected by the Tribe make up about one-third of the Tribe's total tax revenue and these tax revenues are used for various enumerated governmental functions.[6] The Purchasers were not parties to this stipulation. Nevertheless, the record does not reflect what percentage of the Tribe's tax revenues make up the Tribe's total revenues – .000001%, 1%, 10%? Moreover, there is no support in the record that governmental functions of the Tribe were reduced or eliminated as a result of the severance taxes owed by the Purchasers being paid into court.

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[6] Contrary to the Tribe's assertion, the stipulation does *not* provide that the severance taxes collected *from the Respondent oil and gas entities* make up one-third of the Tribe's total tax revenues. There is no support in the record for the Tribe's statement that the targeted tax revenue is all of the oil and gas severance taxes imposed by the Tribe.

The court's injunction in this case was part and parcel of the Purchasers' request to interplead the severance taxes into court. Oklahoma's interpleader statute, Okla. Stat. tit. 12, § 2022, upon which the court relied to grant interpleader in this case, is based on Fed. R. Civ. P. 22,[7] which is based on the following principle:

> The principle of interpleader is that, where two persons are engaged in a dispute, and that which is to be the fruit of the dispute is in the hands of a third party, who is willing to give up according to the result of the dispute, then, . . . that third person . . . is not to be obliged to be at the expense and risk of defending an action, but, on giving up the thing . . . , he is to be relieved, and the Court directs that the persons between whom the dispute really exists shall fight it out at their own expense. The mere statement of the principle shows its justice.

C. Wright, A. Miller & M. Kane, *Federal Practice and Procedure* § 1702 at 493 (1986), *citing Evans v. Wright*, 13 W. R. 468 (C. P. 1865). Essentially, interpleader forces the claimants to contest what essentially is a controversy between them without embroiling the disinterested stakeholder in the litigation over the merits of their respective claims. *Cramer v. Phoenix Mut. Life Ins. Co.*, 91 F.2d 141 (8th Cir. 1937), *cert. denied*, 302 U.S. 739, 58 S. Ct. 141, 82 L. Ed. 571 (1937).

Injunctive relief may be entered in an interpleader action and is recognized as being especially proper in interpleader. *Holcomb v. Aetna Life Insurance Co.*, 228 F.2d

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[7] Oklahoma Committee Comment to § 2022.

75, 82-83 (10th Cir. 1955), *cert. denied*, 350 U.S. 986, 76 S. Ct. 473, 100 L. Ed. 853 (1956); *U.S. v. Major Oil Corp.*, 583 F.2d 1152 (10th Cir. 1978). In *Consolidation Co. v. Bailey*, 330 F. Supp. 474, 478 (W.D. Pa. 1971), *affirmed*, 467 F.2d 1124 (3rd Cir. 1972), *cert. denied*, 410 U.S. 930, 93 S. Ct. 1372, 35 L. Ed. 2d 592 (1973), the court held that affirmative injunctive relief is part and parcel of an interpleader action, stating that "any injunctions issued against suits with respect to the fund are simply ancillary or incidental to the disposition of the fund and merely have the purpose of enforcing the distribution made by the court." Thus, affirmative, injunctive relief is expected, proper and fully within the power of the court in an interpleader action, part and parcel of actions brought for the preservation of a fund for the benefit of others. The very purpose of an interpleader action is the preservation of the fund and it would be illogical and self-defeating for a court not to grant injunctive relief. *Id.*

The injunction issued in this case is to remain in effect until the jurisdictional issue raised by the Tribe is finally determined. Interpleader and the accompanying injunction was issued pursuant to nondiscriminatory Oklahoma state law to protect all parties in the action, including the Tribe. By allowing the Purchasers to interplead the disputed funds until the jurisdictional issue is finally determined, the funds are not paid over to Aircraft (per the court's judgment) and there is no risk of the Tribe not being able to recover the funds if it should finally prevail on the jurisdictional issue.

Injunctions have previously been granted against Indians in cases in order to prevent irreparable injury. *See, e.g., United States v. State of Oregon*, 657 F.2d 1009 (9th

Cir. 1981) (preliminary injunction restricting on-reservation fishing by Indian tribe); *United States v. Hosteen Tse-Kesi*, 191 F.2d 518 (10th Cir. 1951) (Navajo Indians enjoined from repeated and continuing trespasses on lands of the United States; *UNC Resources, Inc. v. Benally*, 518 F. Supp. 1046 (D.C. Ariz. 1981), (preliminary injunction barring the Navajo Tribal Court from exercising jurisdiction until the district court determined whether it or the tribal court had jurisdiction over an Indian plaintiff's civil suit against a non-Indian defendant which arose out of allegedly tortious conduct occurring off the reservation).

In this case, interpleader and the accompanying injunction were granted pursuant to nondiscriminatory Oklahoma state law. The injunction will remain in effect only until the jurisdictional issue raised by the Tribe is finally decided. The court's order directing the Purchasers to pay severance taxes owed to the Tribe into court, and enjoining the parties from taking any action against the Purchasers to collect the severance taxes being paid into court, does not interfere with the Tribe's right to self-government.

III. THE TRIBE'S ATTEMPT TO COLLATERALLY ATTACK THE UNDERLYING JUDGMENT SOUGHT TO BE ENFORCED IN THIS ACTION IS IMPERMISSIBLE.

The Tribe attempts to support its Petition by including facts not supported by the record and by going behind the state district court's judgment, rendered on Aircraft's petition for equitable garnishment, to attack the

underlying judgment sought to be enforced. The Tribe did not seek review by this Court of the Oklahoma Supreme Court's decision on the underlying judgment, and the underlying judgment is final. *See Aircraft I.* The Tribe's collateral attack on the underlying judgment is impermissible. A collateral attack is an attempt to avoid, defeat, or evade a judgment, or to deny its force and effect, in an incidental proceeding not provided by law for the express purpose of attacking it. *Trustees of Somerset Academy v. Picher,* 90 F.2d 741, 744 (lst Cir. 1937), *cert. denied,* 302 U.S. 737, 58 S. Ct. 139, 82 L. Ed. 570 (1937). In the case of a collateral attack on a domestic judgment of a court of general jurisdiction, every reasonable presumption shall be indulged in support of the regularity and validity of the judgment, and, unless the contrary affirmatively appears from the face of the record, it generally will be presumed that the court had jurisdiction of the subject matter and of the parties, and that facts existed which were necessary to give the court jurisdiction or power to render the particular judgment. *Cook v. Cook,* 342 U.S. 126, 128-29, 72 S. Ct. 157, 159-60, 96 L. Ed. 146 (1951); *Pettit v. American Nat. Bank of Austin,* 649 P.2d 525, 529 (Okla. 1982).

The record in this matter does not include the assumption agreement which was the basis for imposing liability on the Tribe in the underlying action. If the Tribe waived sovereign immunity in the agreement, such waiver will be effective here to bar the Tribe's assertion of sovereign immunity. *See, e.g., Oklahoma Tax Commission v. Citizens Band Pottawatomie Indian Tribe,* 498 U.S. 505, 509, 111 S. Ct. 905, 909, 112 L. Ed. 2d 1112, 1119 (1991) (acknowledging the tribe's ability to waive sovereign

immunity). Moreover, the face of the Oklahoma Supreme Court's opinion in *Aircraft I*, does not affirmatively show that the court did not have jurisdiction over the Tribe in the underlying action. Absent some affirmative evidence of the assumption agreement, which was the basis for finding liability against the Tribe in the underlying action, or some other evidence, it must be presumed that the district court had jurisdiction over the Tribe in the underlying action. Collateral attack of the now final judgment is therefore impermissible.

In an analogous case decided under Oklahoma law, the court held that land owned by a full-blooded Indian was subject to a levy on execution as unrestricted land where the state district court had previously determined the land was free of restrictions, and no appeal was taken from the court's adjudication. *Barnett v. Newcomer*, 307 P.2d 148 (Okla. 1957). Moreover, in this case, the court's determination of its jurisdiction in the underlying action is *res judicata*. *See U.S. ex rel. Robinson Rancheria v. Borneo, Inc.*, 971 F.2d 244, 250-51 (9th Cir. 1992), *citing Durfee v. Duke*, 375 U.S. 106, 111-12, 84 S. Ct. 242, 245, 11 L. Ed. 2d 186 (1963) (in an action to enforce a judgment, the underlying court's determination of its jurisdiction over the matter is *res judicata* where a party appeared, contested jurisdiction and lost).

CONCLUSION

In view of the foregoing, further review of this action is unwarranted, and the Petition for a Writ of Certiorari should be denied.

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IN THE SUPREME COURT OF THE STATE OF OKLAHOMA

AIRCRAFT EQUIPMENT COMPANY, Appellee, vs. THE KIOWA TRIBE OF OKLAHOMA, et al., Appellants.	)	No. 86.184 (CJ-94-2522) (Filed Jan. 5, 1996)

BRIEF IN CHIEF OF THE KIOWA TRIBE OF OKLAHOMA

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IN THE SUPREME COURT OF THE STATE OF OKLAHOMA

AIRCRAFT EQUIPMENT COMPANY, Appellee,	)	No. 86,184 (CJ-94-2522)
v.	)	
THE KIOWA TRIBE OF OKLAHOMA, et al., Appellant.	)	

BRIEF IN CHIEF OF THE KIOWA TRIBE OF OKLAHOMA

Appellant, The Kiowa Tribe of Oklahoma ("Kiowa"), submits the following brief in support of its appeal from a state court judgment which entered a creditor's bill against Kiowa and enjoined Kiowa from enforcing its tribal laws.

ABSTRACT OF THE RECORD

This appeal challenges Oklahoma's authority over a suit to seize the tax revenues of a federally recognized Indian tribe and to restrain the tribe from enforcing its tribal taxation laws.

The facts involved in this appeal are undisputed. Kiowa is a federally recognized Indian tribe. In a separate case, the District Court of Oklahoma County entered a damage judgment against Kiowa and in favor of Aircraft

Equipment Company ("Aircraft"). (R. 125-31)[1] That judgment arose from Kiowa's default upon an assumption of a promissory note. Assumption of the promissory note was consideration for the purchase of shares in an Oklahoma corporation. In the assumption agreement, Kiowa specifically reserved its sovereign rights. Kiowa did not waive its sovereign immunity or consent to suit in Oklahoma courts. (R. 244)

The damage judgment, and orders which enforced the judgment by garnishing Kiowa's tax revenues, are on appeal in this Court, *Aircraft Equipment Company v. The Kiowa Tribe of Oklahoma*, No. 82,505, and *Aircraft Equipment Company v. The Kiowa Tribe of Oklahoma*, No. 85,272.

This appeal arises from Aircraft's separate suit to obtain, as a post-judgment remedy, a creditor's bill. Aircraft sought a creditor's bill to order oil and gas producers, which remove oil and gas from Kiowa land and are subject to Kiowa's oil and gas severance tax, to pay the Kiowa severance tax to Aircraft rather than to Kiowa. (R.1)

The defendant oil companies filed pleadings which, essentially, interplead the severance tax revenues. (R. 158, 212, 236, 310, 313-14, 343, 409-21) The defendant oil companies also sought orders enjoining Kiowa from enforcing its tribal tax laws. (R. 160, 213, 236, 409-21) Kiowa's tribal tax laws provide a lien and lien foreclosure mechanism

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[1] Citations to "R." refer to the Record, previously bound in Record No. 85,975, as stated in the Court clerk's Index in this appeal.

where severance taxes are not paid upon leases subject to the tribal tax. (R. 258)

Kiowa asserted that the District Court of Oklahoma County had no authority over it because, as a federally recognized Indian tribe, it has sovereign immunity from a damage action and sovereign immunity from an action to enforce a damage judgment. (R. 240-80) Kiowa also asserted that if the District Court of Oklahoma County had any authority over it, then the use of that authority to seize its tax revenues and enjoin it from enforcing its tax law was an impermissible infringement upon its federally protected sovereign rights. (R. 240-80)

The District Court of Oklahoma County concluded that if it had jurisdiction to enter a damage judgment, then there must be jurisdiction to enforce that judgment. (R.III,[2] 156 at pp. 19-20) Hence, the district court granted creditor's bill with respect to Kiowa's tax revenues. (R.III, 129-30) Recognizing, however, that the underlying judgment was on appeal and its jurisdiction was questionable, the District Court ordered the Oklahoma County Court Clerk to hold the tax revenues pending outcome of the appeal of the underlying judgment. (R.III, 156 pp. 19-22) The district court also recognized that Kiowa would attempt to foreclose its tribal law tax lien on the oil companies' mineral leasehold interests and thus the court enjoined Kiowa from enforcing that lien, pending outcome of the appeal. (R.III, 129-30, 156 at pp. 19-20) Hence, Kiowa's tax revenues are currently being paid to the

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[2] Citations to "R. III" refer to those documents indexed within this Record and referred to in this manner in the Court Clerk's Index.

Oklahoma County Court Clerk and Kiowa is enjoined from enforcing its tribal tax laws.

ARGUMENTS AND AUTHORITIES

I.

OKLAHOMA HAS NO JUDICIAL POWER OVER DAMAGE SUITS OR A SUIT TO ENFORCE DAMAGE JUDGMENTS AGAINST FEDERALLY RECOGNIZED INDIAN TRIBES

In order to define Oklahoma's judicial authority over damage suits and the enforcement of damage judgments against a federally recognized Indian tribe, one must define the boundary between two sovereigns – the state and the tribe – with reference to standards set by a third sovereign – the federal government. Each of these areas is addressed below.

1. OKLAHOMA LAW RELATIVE TO "INDIAN INTERESTS" AND TRIBAL IMMUNITY

Oklahoma defined its jurisdiction with respect to "Indian interests" in *Lewis v. Sac and Fox Tribe*, 896 P.2d 503 (Okla. 1994), *cert. denied*, 116 S.Ct. 476 (1995).[3] *Lewis* involved a claim for specific performance by Sac and Fox Housing Authority of an agreement to convey real property and for an accounting for mineral revenues. As an

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[3] This discussion omits reference to *State ex rel. May v. Seneca-Cayuga Tribe*, 711 P.2d 77 (Okla. 1985). This Court does not appear to have relied upon *Seneca-Cayuga* after the decision in *Seneca-Cayuga Tribe v. Thompson*, 874 F.2d 709 (10th Cir. 1989).

accounting is retrospective in nature and relates to revenues received, presumably, a money judgment was involved. *Lewis* defined Oklahoma's jurisdiction over "Indian interests" as all matters except: (1) those explicitly withdrawn by Congress and (2) those that infringe upon tribal self-government. *Lewis,* 896 P.2d at 508.[4]

It is significant that *Lewis* spoke of "Indian interests" as opposed to dealing directly with the sovereign immunity of a Indian tribe.

Oklahoma addressed the issue of tribal immunity in *Hoover v. Kiowa Tribe of Oklahoma,* No. 78,185, Oklahoma Supreme Court (December 12, 1995). In *Hoover,* Oklahoma drew upon *Lewis* to confirm that it had inherent power over "Indian interests" and then concluded that sovereign immunity was no bar to its judicial power over a damage suit against a tribe, when the tribe was engaged in commercial activity off Indian country.

2. FEDERAL LAW RELATIVE TO STATE AUTHORITY OVER INDIAN TRIBES

The federal law concerning jurisdiction over a federally recognized Indian tribe is considerably more complex, and a state's inherent power is considerably less than suggested by *Lewis* and *Hoover.* Federal law begins with the recognition of tribal sovereignty and involves

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[4] Justice Summers, dissenting, suggests that the issue of state court cognizance is determined by reference to whether the real property in question was "Indian country." In the absence of evidence that it was "Indian country," the dissent found state court jurisdiction. *Lewis,* 896 P.2d at 517, 522.

the result of the Indian Commerce Clause[5] assigning to the federal government the control of commerce with Indian tribes.

Federal law recognizes that the *inherent sovereignty* of Indian tribes is *intact*, except to the extent that it has been withdrawn by federal statute or treaty. *Iowa Mutual Insurance Company v. LaPlante*, 480 U.S. 9, 107 S.Ct. 971, 94 L.Ed.2d 10 (1987).

Because tribal sovereignty is presumed intact, it includes an extensive array of rights, which then are limited and defined based only upon federal actions. The jurisprudence that has sprung from the analysis of tribal sovereignty is so extensive that a generalized description of the nature of tribal sovereignty is impossible. Nonetheless, as *Lewis* recognizes, many cases arising from conflicts between tribal immunity and state power (generally over taxation and regulation), proceed by analyzing federal pre-emption[6] and infringement upon tribal self-government, *see Cotton Petroleum Corp. v. New Mexico*, 490 U.S. 163, 109 S.Ct. 1698, 104 L.Ed.2d 209 (1989), and often emphasize the location and nature of the disputed activities. *Mescalero Apache Tribe v. Jones*, 411 U.S. 145, 93 S.Ct. 1267, 36 L.Ed.2d 114 (1973) (tribally owned ski lift off Indian country subject to state gross receipts tax, but not

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[5] United States Constitution, Article I, Sec. 8, Cl. 3; *Oneida County, N.Y. v. Oneida Indian Nation of N.Y. State*, 470 U.S. 226, 105 S.Ct. 1245, 84 L.Ed.2d 169 (1985).

[6] *In Re Green*, 980 F.2d 595 (9th Cir. 1992) recognizes that "(a)lmost by definition, application of the pre-emption analysis is limited to situations where the state itself is seeking to tax or regulate conduct on the reservation." *Id.* at 595.

subject to state use tax). The preemption/infringement formula, however, is not an exhaustive definition of tribal sovereignty or state power. It is not exhaustive because it fails to account for the fact that federal law recognizes absolute tribal immunity to damage suits. In *Oklahoma Tax Comm'n v. Citizen Band Potawatomi Indian Tribe*, 498 U.S. 505, 111 S.Ct. 905, 112 L.Ed.2d 1112 (1991), Oklahoma sought orders forcing a tribe to collect state cigarette taxes on certain Indian country cigarette sales and asked for a $2.7 million damage judgment for back taxes on cigarettes already sold. While the Supreme Court found that the tribe should collect Oklahoma cigarette taxes on certain sales, it refused to enter a money judgment because tribes are immune from damage judgments. *Citizen Band*, 111 S.Ct. at 912.

3. THE *LEWIS* DESCRIPTION OF OKLAHOMA JURISDICTION IS EITHER OVERLY BROAD OR INCONSISTENT WITH FEDERAL LAW; *HOOVER* IS INCONSISTENT WITH FEDERAL LAW

Lewis is either overly broad or inconsistent with federal law. This is so, because federal law recognizes that the inherent sovereignty of Indian tribes is intact, except to the extent that it has been withdrawn by federal statutes or treaty. *LaPlante*, 107 S.Ct. at 975. In short, federal law *assumes tribal sovereignty*, absent some retraction of that sovereignty by federal action. *Lewis*, on the other hand, takes the reverse position and assumes state jurisdiction over "Indian interests" absent an explicit federal ouster or an infringement upon tribal self-government. These two standards are directly opposite to one another.

Lewis describes state jurisdiction much more extensively than federal authority permits.[7]

Lewis reached its conclusion based upon two novel premises: (1) tribal immunity has been "abandoned"[8] and (2) with immunity "abandoned," inherent state court jurisdiction over Indian interests is defined solely by considerations which relate to the division of judicial power between the state and federal governments.[9]

The first *Lewis* premise – tribal immunity has been "abandoned" – is novel because federal law specifies that tribal immunity is lost only by: (1) a clear and unequivocal waiver by the tribe or (2) Congressional action. *Santa Clara Pueblo v. Martinez*, 436 U.S. 49, 98 S. Ct. 1670, 56 L.Ed.2d 106 (1978). *Lewis* does not involve a tribal waiver or a Congressional act. *Lewis* has neither of the federally prescribed requirements to avoid immunity. Instead,

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[7] The *Lewis* dissent that would key determination of jurisdiction based upon the geographical location of the property is also too broad. A federally recognized Indian tribe, wherever it may be, is still a federally recognized Indian tribe and the state is still subject to the federal laws which define the nature of that Indian tribe. An Indian tribe's federally protected sovereign immunity to damage suit has an extra-territorial component. *Sac and Fox Nation v. Hanson*, 47 F.3rd 1061 (10th Cir.1995). To allow state law to strip tribal immunity to damages suit based upon geography is to allow state law to override supreme federal law.

[8] *Lewis*, 896 P.2d at 506, 511, n. 59.

[9] *Lewis'* linchpin authority, *Yellow Freight System, Inc. v. Donnelly*, 494 U.S. 820, 110 S.Ct. 1566, 108 L.Ed.2d 834 (1990), involves only the concepts of federal versus state authority. It does *not* address interaction with a third sovereign – an Indian tribe.

Lewis avoided immunity by using its own theory of abandonment.[10]

The second *Lewis* premise – inherent state court jurisdiction over Indian interests is defined solely by considerations used in dividing jurisdiction between state and federal governments – is equally novel. This is so because a court's authority over a sovereign is determined from the extent of the *consent of the sovereign itself* to be sued. *United States v. Testan,* 424 U.S. 392, 96 S.Ct. 948, 47 L.Ed.2d 114 (1976); *State of Minnesota v. United States,* 305 U.S. 382, 59 S.Ct. 292, 83 L.Ed. 235 (1939) (United States consent to suit in federal courts in condemnation of Indian land does not create jurisdiction in state courts).[11] *Lewis* is devoid of reliance upon any consent, tribal or Congressional, to create the state court's jurisdiction.

Hoover recognized *Lewis'* failure to address tribal sovereign immunity and acknowledged *Lewis*'s reliance upon the state's inherent authority. *Hoover,* slip opinion, p. 4. *Hoover* relied on *Padilla v. Pueblo of Acoma,* 107 N.M. 174,

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[10] *Lewis* also suggests that any abandonment may have been somewhat less than clear and unequivocal as required by *Santa Clara,* and in fact may have been an implied abandonment. Federal law provides that a waiver *cannot* be implied. *United States v. Testan,* 424 U.S. 392, 96 S.Ct. 948, 47 L.Ed.2d 114 (1976). See *Lewis,* 896 P.2d at 511, n. 59.

[11] This analysis proceeds upon the approach of a sovereign being sued in its own courts as opposed to a sovereign declaring its inherent power over another sovereign. This is the proper approach because a state has no authority to declare its inherent jurisdiction over an Indian tribe. Tribal sovereignty is defined by federal law, not by state declaration. *LaPlante,* 107 S.Ct. at 976.

754 P.2d 845 (1988), *cert. denied*, 490 U.S. 1029 (1989), for the idea that a lack of federal law prohibiting one state from exercising jurisdiction over another state, mixed with New Mexico's policy of allowing itself to be sued, was a passable substitute for tribal consent to be sued. Hence, *Padilla* concluded that a state court had jurisdiction over a damage suit against a sovereign tribe and it was not necessary to obtain consent by the tribe or by Congress. *Padilla*, 754 P.2d at 850.

The New Mexico courts, however, have recognized that *Padilla* is flawed. In *DeFeo v. Ski Apache Resort*, 904 P.2d 1065 (N.M. Ct. App. 1995) *cert. denied*, 903 P.2d 844 (N.M. 1995), the New Mexico Court of Appeals held that *Padilla* conflicts with federal law:

> *Padilla* appears to conflict with the Tenth Circuit's more recent holding in *Sac & Fox Nation*, which clearly stated that the location of the commercial activity was not determinative and held that an Indian tribe was immune from suit in state courts "even if the suit results from commercial activity occurring off the [Indian tribe's] reservation," *Sac & Fox Nation*, 47 F.3d at 1065.

DeFeo, 904 P.2d at 1069. The New Mexico Supreme Court denied certiorari in *DeFeo*. *DeFeo*, 904 P.2d at 1065.

The *DeFeo* court held that federal law bars suits against Indian tribes absent a clear waiver by the tribe or by congressional abrogation. *DeFeo*, 904 P.2d at 1067, *citing Citizen Band*, 111 S.Ct. at 909.

The *DeFeo* court adopted the reasoning of the Tenth Circuit *Sac & Fox* opinion and held that a tribe's sovereign immunity applies to a tribe's commercial activity.

DeFeo, 904 P.2d at 1068. The *DeFeo* court concluded that the district court lacked jurisdiction over the tort claim against the tribe and that the tribe had not waived its sovereign immunity by engaging in commercial activity. *DeFeo*, 904 P.2d at 1069.

The *DeFeo* opinion did not need to address the issue of whether a tribe's immunity extends to off-reservation activity because the alleged tort occurred within the tribe's reservation. The court did, however, hold that in light of recent federal decisions, New Mexico courts should give the *Padilla* reasoning a "fresh look." *DeFeo*, 904 P.2d at 1069.

As recognized in *DeFeo*, *Padilla* is wrong. The fact that federal law does not prohibit states from exercising jurisdiction over each other cannot be expanded to tribal immunity cases for two reasons. First, tribes are not states and second, federal law *does* prohibit damages suits against tribes. As held in *DeFeo*, *Padilla* conflicts with federal law. *Hoover* is premised upon *Padilla* and thus *Hoover* is also wrong. *Hoover* was decided without any reference to *DeFeo* or to the federal decisions that forced the New Mexico court to criticize *Padilla*.

4. STATE COGNIZANCE OVER DAMAGE SUITS OR SUITS TO ENFORCE DAMAGE JUDGMENTS AGAINST AN INDIAN TRIBE

Because jurisdiction over a sovereign must grow from that sovereign's consent, Oklahoma's jurisdiction must be drawn solely from federal law that relates specifically to Indian tribes. Only the federal government may define an Indian tribe's sovereignty. *LaPlante*, 107 S.Ct. at

975-75; *Merrion v. Jicarilla Apache Tribe*, 455 U.S. 130, 102 S.Ct. 894, 71 L.Ed.2d 21 (1982). Federal Law on the commerce clause or other unrelated areas simply cannot be expanded to imply a consent by a sovereign tribe to suit. *United States v. Testan*, 424 U.S. 392, 96 S.Ct. 948, 47 L.Ed.2d 114 (1976). Neither can such unrelated law be used to find inherent state power where none exists. Federal law clearly and plainly provides that absent federal retraction, *LaPlante*, 107 S.Ct. at 975, or an express waiver by the tribe, *Santa Clara*, 98 S.Ct. at 1677, tribal sovereignty is intact and it includes immunity from damage suits. *Citizen Band*, 111 S.Ct. at 910-912.

In this case, Kiowa did not waive its immunity. It certainly did not consent to a seizure of its tax revenue. Kiowa specifically reserved its sovereign rights. Hence, the state court cannot base its jurisdiction upon a *Santa Clara*-type waiver.

Congress has never abrogated tribal immunity to damage suits. It certainly has never authorized seizure of a tribe's tax revenue. In fact, the United States Supreme Court has specifically recognized, and refused to abandon, tribal immunity to damage suits, even in a case where it entered orders commanding the tribe to collect certain tobacco taxes for Oklahoma. *Citizen Band*, 111 S.Ct. at 912. Hence, the court cannot draw its jurisdiction from any federal abrogation.

Simply recognizing there is no jurisdiction over a damage suit against an Indian tribe, however, is not to say that there is no capacity to exercise cognizance of a suit involving a tribe. As *Lewis* recognizes, the nation

does have a dual court system. The United States "Constitution, and laws passed pursuant to it, are as much laws in the states as laws passed by the state legislature." *Howlett v. Rose*, 496 U.S. 356, 110 S.Ct. 2430, 110 L.Ed.2d 332 (1990). Under the Supremacy Clause, the federal laws are "the Supreme Law of the Land" that states have a coordinate responsibility to enforce "according to their regular modes of procedure." *Howelett*, 110 S.Ct. at 2438. Also, the *Larson* doctrine[12] permits some degree of specific relief when the activity of a sovereign goes beyond the sovereign's real authority. This has been termed "especially appropriate in Indian law cases." *Tenneco Oil v. Sac & Fox Tribe of Indians of Oklahoma*, 725 F.2d 572 (10th Cir. 1984). Oklahoma is not without cognizance, but it does not have the cognizance it assumes to itself.

Oklahoma must recognize that the federal government grants the state authority over Indian tribes through its regulation of the sovereignty of tribes and its exercise of federal authority under the Indian Commerce Clause. The state's authority is created by what it is given by the federal government. The state's authority is not an inherent authority, limited only by what the federal government takes from the state by way of "ouster." The state cannot rely upon comity to supply a missing consent to jurisdiction. Federal law recognizes significant aspects of tribal sovereignty, including an immunity from damage suits. The state must recognize that immunity is a matter of supreme federal law. This recognition must leave the

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[12] *Larson v. Domestic & Foreign Commerce Corp.*, 337 U.S. 682, 69 S.Ct. 1457, 93 L.Ed. 1628 (1949).

state without authority to enforce a damage judgment by seizing tribal tax revenues.

II.

THE TAXING LAWS AND TAX REVENUE OF A FEDERALLY RECOGNIZED INDIAN TRIBE ARE NOT SUBJECT TO STATE COURT JURISDICTION; COMITY REQUIRES OKLAHOMA TO PROTECT KIOWA'S TAX REVENUES

Even if this Court concludes that it does, indeed, have jurisdiction over a damage suit or a suit to enforce a judgment against a federally recognized Indian tribe, then, it may not enforce a judgment by seizing tribal tax revenues and enjoining enforcement of tribal tax laws. To do so violates the *Lewis* restriction against infringing upon tribal self-government.

"[T]he power to tax is an essential attribute of Indian sovereignty because it is a necessary instrument of self-government and territorial management." *Merrion v. Jicarilla Apache Tribe*, 455 U.S. 130, 102 S.Ct. 894, 71 L.Ed.2d 21 (1982). The power to tax is, essentially, meaningless, and certainly not useful in self-government, if the fruits of that power are seized by the state and if the state enjoins enforcement of the tax laws. Seizing tax revenue and enjoining enforcement of tribal tax law is an obvious infringements upon tribal self-government which cannot be allowed.

If Oklahoma is allowed to pursue the approach to Indian sovereignty followed by *Padilla* (but rejected by *DeFeo*), then it must also recognize that Oklahoma would not allow an Oklahoma court to seize Oklahoma's tax

revenues. Under *Padilla*, comity principles would require that Oklahoma not seize another sovereign's tax revenues.

CONCLUSION

Oklahoma has no judicial power over a damage suit against a federally recognized Indian tribe. Likewise, it has no judicial power to enforce a damage judgment against a federally recognized Indian tribe. Oklahoma's power over suits and enforcement of judgments against tribes arises from the consent of the tribe or from a grant from the federal government. In this case, the tribe did not consent, but, reserved its sovereign rights. The federal government has never authorized damage suits or suits to enforce damage judgments against a tribe, but, has clearly recognized tribal immunity from damages suits.

The power to tax is an essential attribute of Indian sovereignty because it is a necessary instrument of self-government. Seizing the fruits of this power must be an infringement upon a tribe's federally protected right to self-government.

The judgment and orders of the district court must be reversed and vacated and the court ordered to dismiss the case. The Oklahoma County Court Clerk should be ordered to pay Kiowa's tax revenues to Kiowa.

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CERTIFICATE OF SERVICE

I hereby certify that on this 5th day of January, 1996, a true and correct copy of the above and foregoing document was placed in the United States Mail, postage prepaid and addressed to:

I further certify that a copy of the above and foregoing Brief in Chief was filed in the Office of the County Clerk of Oklahoma County on the 5th day of January, 1996.

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IN THE SUPREME COURT
OF THE STATE OF OKLAHOMA

AIRCRAFT EQUIPMENT COMPANY, a partnership, Appellant, versus THE KIOWA TRIBE OF OKLAHOMA, AQUILLA ENERGY CORPORATION, THE HOMESTAKE ROYALTY CORPORATION, KERR-McGEE REFINING CORPORATION, ORYX ENERGY CORPORATION, PLAINS LIQUIDS TRANSPORT, INC., SUN COMPANY, INC. (R & M), ASSOCIATED NATURAL GAS, INC., ASSOCIATED TRANSPORT AND TRADING COMPANY, SENEX PIPE LINE COMPANY, AND HAMON OPERATING COMPANY, Appellees.	)	No. 85975 (Filed Sep. 22 1995)

ANSWER BRIEF OF THE
KIOWA TRIBE OF OKLAHOMA

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IN THE SUPREME COURT
OF THE STATE OF OKLAHOMA

AIRCRAFT EQUIPMENT COMPANY, a partnership,	)	
Appellant,	)	No. 85975
versus	)	
THE KIOWA TRIBE OF OKLAHOMA, AQUILLA ENERGY CORPORATION, THE HOMESTAKE ROYALTY CORPORATION, KERR-McGEE REFINING CORPORATION, ORYX ENERGY CORPORATION, PLAINS LIQUIDS TRANSPORT, INC., SUN COMPANY, INC. (R & M), ASSOCIATED NATURAL GAS, INC., ASSOCIATED TRANSPORT AND TRADING COMPANY, SENEX PIPE LINE COMPANY, AND HAMON OPERATING COMPANY,	)	
Appellees.	)	

ANSWER BRIEF OF THE KIOWA TRIBE OF OKLAHOMA

INTRODUCTION

This appeal is part of an extensive group of legal proceedings that are currently pending at various stages of trial or appeal. All the proceedings center upon the question of whether a federally recognized Indian tribe, which has not waived its sovereign immunity, may be sued for damages in Oklahoma courts, and, if so, may Oklahoma courts then seize tribal tax revenues in satisfaction of a damage judgment against the tribe.

The Kiowa Tribe of Oklahoma (Kiowa) has consistently asserted that a key aspect of its federally recognized sovereignty is that it is immune from damage suits and its property, especially its tax revenues, cannot be seized.

The issues raised in this appeal center upon various orders entered at a May 26, 1995, motion docket. Most of those orders were preliminary, non-dispositive and appear to have been supplanted by a judgment entered on August 14, 1995, after a trial on the merits of this particular case.

The underlying case in this group of related matters is *Aircraft Equipment v. The Kiowa Tribe of Oklahoma*, No. CJ-92-10176, District Court of Oklahoma County. In that case, Aircraft Equipment Company ("Aircraft") recovered a money judgment upon a guaranty executed by Kiowa.

That case was appealed by Kiowa in *Aircraft Equipment Company v. The Kiowa Tribe of Oklahoma*, No. 82,505, Supreme Court of Oklahoma. The Court of Appeals

affirmed the money judgment. The Supreme Court of Oklahoma granted certiorari. The case awaits decision.

While the appeal was pending, Aircraft garnished the severance tax revenue of Kiowa.[1] The garnishment generated a second appeal, *Aircraft Equipment Company v. The Kiowa Tribe of Oklahoma and Watson Management Group, Inc.*, Garnishee, No. 85,272, Supreme Court of Oklahoma.[2]

Apparently wishing to avoid successive garnishments, or perhaps wishing to avoid jurisdictional issues being posed by Kiowa, Aircraft sued for a creditors' bill in the case *Aircraft Equipment Company v. the Kiowa Tribe of Oklahoma* et al, No. CJ-94-2522, District Court of Oklahoma County, Oklahoma. (This appeal is from rulings in the creditor's bill case.) That suit sought an order to direct various named oil companies to pay Kiowa's severance tax not to Kiowa, but, directly to Aircraft in satisfaction of its judgment.

This appeal arises from certain preliminary and non-dispositive orders entered in May, prior to any hearing of the merits of the suit for a creditors' bill.

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[1] Kiowa, in exercise of its federally recognized sovereign authority, has imposed a severance tax upon production of oil and gas from lands subject to its jurisdiction. *Merrion v. Jicarilla Apache Tribe*, 455 U.S. 130, 102 S.Ct. 894, 71 L. Ed. 2d 21 (1982): The tribal law which creates the severance tax also provides for a lien and foreclosure as a remedy for failure to pay the tax.

[2] Kiowa also applied for a writ of prohibition in the garnishment proceedings, *The Kiowa Indian Tribe of Oklahoma v. The Honorable Carolyn R. Ricks*, No. 84,729, Supreme Court of Oklahoma. The Supreme Court refused original jurisdiction.

The creditors' bill suit was heard on the merits on August 14, 1995. The judgment and decree entered on the merits has generated yet another appeal, *Aircraft Equipment Company v. The Kiowa Tribe of Oklahoma et al.*, No. 86,184, Supreme Court of Oklahoma, in which Kiowa has challenged rulings of the District Court of Oklahoma County which (1) order its tax revenues paid to the Oklahoma County Court Clerk (2) restrain Kiowa from enforcing its laws creating liens to enforce payment of the tax.

The common thread of Kiowa's position in all of these proceedings is that, as a federally recognized Indian tribe, it is sovereign and, by federal law, immune from damage suits. As a result, Oklahoma courts have no jurisdiction to hear damage suits against it. Further, the seizure of its tax revenues is an impermissible infringement upon its federally recognized and federally protected sovereignty.

FACTS

Most of Aircraft's points of error in this case arise from orders entered at a May 26, 1995, motion docket. There were no witnesses called, nor evidence taken at the motion docket – only arguments of counsel.

At that May 26, 1995 motion docket, the trial court was faced with a situation in which:

1. Aircraft moved for summary judgment upon its suit for a creditors' bill to direct the oil company defendants to pay Kiowa's severance tax directly to Aircraft.

2. Kiowa moved for dismissal of Aircraft's petition for a creditors' bill, and raised jurisdictional issues arising from its sovereign and immune status as a federally recognized Indian tribe.

3. The oil company defendants found themselves, on the one hand, subject to a possible court order directing them to pay Kiowa's tax revenues to Aircraft, and, on the other hand, facing Kiowa's assertion that such an order was jurisdictionally void, and Kiowa would foreclose its tax liens upon the oil companies' oil and gas leases. Understandably, the oil companies interplead the tax revenues and asked to be relieved from further proceedings.

At the May 26, 1995, motion docket, the trial court determined that most dispositive issues were on appeal in the above described appeals.

With pragmatism, if not evidence, the trial court denied the motions of Aircraft and Kiowa, ordered the oil companies to make all payments of Kiowa's severance taxes to the court clerk of Oklahoma County, restrained Kiowa from foreclosing its tribal law lien against the oil company leases, and restrained Aircraft from further garnishment against the oil companies. The matter was set for trial.

The essence of this appeal is Aircraft's attempt to escape from the trial court's orders entered on May 26, 1995.

As the creditors' bill case has now been tried on the merits, and a judgment has now supplanted most, if not

all, of the May 26, 1995, orders, this appeal is largely moot.

KIOWA'S ANSWER TO PROPOSITION I: INJUNCTION AGAINST AIRCRAFT

Proposition I appears to complain of the issuance of injunctive relief against Aircraft at the May 26, 1995, motion docket.

As no relief is sought against Kiowa, Kiowa makes no response to Proposition I. Kiowa does observe, though, that the May 26, 1995, orders were supplanted by the judgment entered on August 14, 1995.

KIOWA'S ANSWER TO PROPOSITION II: INTERPLEADER

Defendant oil companies responded to conflicting claims upon the severance tax funds they hold by requesting relief in the nature of interpleader. The relief required including being dismissed upon paying funds into court.

Again, as no relief is sought against Kiowa, Kiowa makes no response to Proposition II. Kiowa does observe, however, that the oil companies are not, at least in this case, "garnishees."

KIOWA'S ANSWER TO PROPOSITION III: ATTORNEY FEES

In interpleader, the award of attorney fees is in the discretion of the trial court under 12 O.S. § 2022.

Kiowa responds, however, that no cause of action, interpleader or otherwise, is proper to seize its tax revenue. As the court has no power to seize tax revenues, it also has no power to award attorney fees from such funds.

As a federally recognized Indian tribe, Kiowa is a sovereign, immune from any suit for damages. *New Mexico v. Mescalero Apache Tribe*, 462 U.S. 324, 103 S.Ct. 2378, 76 L Ed 2d 611 (1983); *Oklahoma Tax Commission v. Citizen Band Potawatomi Indian Tribe;* 498 U.S. 505, 111 S. Ct. 905, 112 L Ed 2d 1112 (1991) Admittedly, Indian tribes are sued. Such cases are generally limited to actions of an equitable or declaratory nature where the decrees are sufficiently restricted so as not to infringe upon the tribe's sovereignty. *Warren Trading Post Co. v. Arizona Tax Commission*, 380 U.S. 685, 85 S. Ct. 1242, 14 L ed 2d 165 (1965). Notwithstanding the fact that federal law will allow some equitable or declaratory relief against tribes, federal law very plainly will not allow a damage suit. *Citizen Band*, supra. Seizure of tax revenue absolutely denies the sovereign the economic capacity to act as a sovereign. As such this seizure must be an infringement upon a tribe's federally protected right to self-governance.

KIOWA'S ANSWER TO PROPOSITION IV: GARNISHMENT

In essence, Aircraft asserts that notwithstanding its creditors' bill suit, it should be allowed to continue to garnish the defendant oil companies.

The May 26, 1995, order enjoining Aircraft's garnishment is now replaced with a judgment and thus this proposition appears to be moot.

CONCLUSION

This appeal is largely moot. The orders entered at the May 26, 1995, motion docket – largely preliminary and non-dispositive – have been replaced by a judgment entered upon trial on the merits. Beyond that, the Kiowa Tribe of Oklahoma, by federal law, is immune from this action. That complaint, however, is being pursued in other pending appeals.

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